Proctor Express Incorporated of New Jersey, B.A. Proctor, Inc., and Rutgers Express, Inc. *and* **Teamsters Local Union No. 107, affiliated with International Brotherhood of Teamsters, AFL–CIO.** Case 4–CA–20745

September 30, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On June 10, 1994, Administrative Law Judge David L. Evans issued the attached decision. The Respondents filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings, and conclusions, as modified, and to substitute a new Order as set forth below.

1. We agree with the judge that the Respondents are a single employer and are jointly and severally liable for remedying the unfair labor practices found. In imposing liability on B.A. Proctor, Inc. (B.A. Proctor), and Rutgers Express, Inc. (Rutgers), we note the following.

On February 13, 1992,[1] Bruce Arbeiter, the sole shareholder and president/treasurer of Rutgers, formed B.A. Proctor for the purpose of purchasing the stock of Proctor Express, Inc. (Proctor Express). Thereafter, Arbeiter owned 50 percent of B.A. Proctor's stock and his daughter, Alyson Distel, owned the remaining 50 percent of the stock. On February 19, Arbeiter met with union representatives, told them that he was considering the purchase of Proctor Express, and was informed that if he did so, he would be responsible for unpaid pension and benefit and welfare debts that Proctor Express owed. On February 22, Arbeiter and the Union reached agreement on a variety of matters affecting the terms and conditions of employment of Proctor Express employees. On March 14, B.A. Proctor formally purchased the stock of Proctor Express.

As detailed by the judge, after the purchase, Arbeiter effectively exercised overall operational control over Rutgers, B.A. Proctor, and Proctor Express. These entities shared common ownership, common management, and centralized control of labor relations. The interrelation of operations is demonstrated by the ability of Arbeiter's son-in-law, Steven Distel, who was Rutgers' vice president and had no official position with Proctor Express, to direct Proctor Express' terminal manager to sign an interline trucking agreement with Rutgers, pursuant to which no payments were ever made between Proctor Express and Rutgers. Further, the terminal manager, Allen Porter, credibly testified that Arbeiter told him that Steven Distel eventually would oversee operations at the Proctor Express terminal and that "the name Proctor would remain for six to nine months, in case there was any hidden liability at which time it would cease to exist and become Rutgers Express."[2]

In these circumstances, we find, in agreement with the judge, that Rutgers, B.A. Proctor, and Proctor Express, through the roles and actions of Arbeiter and Distel, all had a clearly identifiable common connecting interest with one another that warrants imposition of joint and several liability for remedial purposes, including payment of the unpaid health and welfare and pension contributions owed from December 1, 1991. As to B.A. Proctor, its liability flows initially as a purchaser of the Proctor Express stock from Proctor Express' previous ownership. *EPE, Inc.*, 284 NLRB 191, 198 (1987), enfd. 845 F.2d 483 (4th Cir. 1988). As to Rutgers, although it did not, in its corporate form, purchase the assets or business of Proctor Express, liability is appropriate given the factual findings discussed above, and those detailed by the judge, in support of his finding of single employer status, particularly the controlling role of Arbeiter as to all three entities. Much as in the somewhat analogous situation of a *Golden State* successor,[3] the facts here show a clearly identifiable and connecting business interest and relationship among all the entities. Further, Arbeiter had specific knowledge of the accrued liabilities of Proctor Express prior to its purchase, and, indeed, he made known to employees and the Union his intention to combine Proctor Express and Rutgers in a matter of months. For these reasons, we affirm the judge's findings with respect to the joint and several liability of Proctor Express, B.A. Proctor, and Rutgers.

2. On May 13, the Proctor Express terminal in Pennsauken, New Jersey, ceased operations. When the Pennsauken terminal closed, Proctor Express' customers, about 40 accounts, went elsewhere for their trucking needs. Within a week of the closing, Rutgers successfully solicited and secured two of these accounts: about 20 percent of the work that Proctor Express previously had performed for Excel Logistics and work that Proctor Express formerly had performed for Stockham Valve. There is no evidence that Rutgers se-

[1] All dates are in 1992 unless stated otherwise.

[2] Consistent with Porter's testimony, Proctor Express driver Michael Borradaile credibly testified that Arbeiter told him that within 6 months to a year, Proctor "would become Rutgers Express" and Union Representative Edmund Woods credibly testified that Arbeiter told him that "down the road, he would have to combine companies."

[3] *Golden State Bottling v. NLRB*, 414 U.S. 168 (1973).

cured any other former Proctor Express accounts in the aftermath of the closing.

The General Counsel contended that by virtue of its performance of work for Excel Logistics and Stockham Valve, the Respondents transferred and relocated bargaining unit work without bargaining with the Union. The judge agreed, finding that the Respondents violated Section 8(a)(5) and (1) under *Dubuque Packing Co.*, 303 NLRB 386 (1991), and *Owens-Brockway Plastic Products*, 311 NLRB 519 (1993). We disagree.

We find that Rutgers' successful solicitation of business from two of the accounts formerly performed by Proctor Express was not a "relocation" or "transfer" of unit work. In *Dubuque* and *Owens-Brockway*, the employers decided to relocate and transfer unit work from one facility within their operations to another facility.

Here, the Respondents did not, in any real or practical sense, "relocate" or "transfer" unit work coincident with the closing of the Pennsauken terminal. Instead, when that terminal ceased operations, the Respondents terminated all unit employees working there. There is no contention that the Respondents unlawfully failed to bargain over the decision to close the Pennsauken terminal or over the effects on unit employees of the decision to close, nor is there any contention that the terminal ceased operations for anything other than valid business reasons. Furthermore, the Respondents did not retain control over any work previously performed by unit employees. Other trucking companies thereafter obtained most of the Pennsauken terminal customer accounts in open competitive bidding. When Rutgers secured the Excel Logistics and Stockham Valve accounts and assigned the work to its employees, the Pennsauken terminal unit represented by the Union had effectively ceased to exist. Rutgers therefore did not transfer or relocate an existing unit's work.[4] Accordingly, we shall dismiss that portion of the complaint, and modify the judge's recommended Order pertaining to the alleged relocation of work after the closing of the Pennsauken terminal.[5]

[4] We note that there is no evidence that the solicitation of the former Proctor Express accounts effectively was a continuation of identical trucking agreements simply under a new name.

Chairman Gould agrees that the situation presented here did not involve a transfer or relocation of an existing unit's work. If such employer actions were involved, Chairman Gould would not rely on the *Dubuque* test to determine whether there was a decisional bargaining obligation.

[5] In his Order and notice the judge inadvertently designated March 13, 1992, as the termination date for delinquent benefit fund contributions. The correct date is May 13, 1992. The substituted Order and notice reflect the corrected date.

Inasmuch as there is no finding that the decision to close the Pennsauken terminal violated the Act in any respect, we shall delete sec. B of the judge's Order and the related appendix and amend his recommended remedy accordingly.

ORDER

The Respondents, Proctor Express Incorporated of New Jersey, of Pennsauken, New Jersey, and B.A. Proctor, Inc., and Rutgers Express, Inc. of Hummels Wharf, Pennsylvania, and South Plainfield, New Jersey, their officers, agents, successors, and assigns, shall jointly and severally

1. Cease and desist from

(a) Refusing to recognize and bargain collectively with Teamsters Local Union No. 107, affiliated with International Brotherhood of Teamsters, AFL–CIO, as the exclusive collective-bargaining representative of Proctor Express' drivers, platform employees, and mechanics at Pennsauken, New Jersey (the unit), by: (1) unilaterally discontinuing payments to contractual benefit funds on behalf of the unit employees; (2) unilaterally discontinuing payments to unit employees for vacations, sick pay, or similar established terms and conditions of employment; and (3) unilaterally transferring platform work previously performed by the unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Pay all delinquent contributions for the unit employee hours worked from December 1, 1991, through May 13, 1992, to the pension trust fund and the health and welfare trust fund established by the collective-bargaining agreements which expired March 31, 1994, and reimburse, with interest, the unit employees for any expenses ensuing from the failures to make such contributions, as set forth in the remedy section of the judge's decision.[6]

(b) Pay to all unit employees, with interest, all moneys due as 1992 vacation pay and sick-day pay, as set forth in the remedy section of the judge's decision.

(c) Make whole, with interest, the employees affected by the unilateral transfer of platform work, as set forth in the remedy section of the judge's decision.[7]

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination

[6] To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of the delinquency, the Respondents will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondents otherwise owed the fund.

[7] In the event unit employees were laid off or terminated as a result of the transfer of platform work, backpay shall be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950). In the event that unit employees affected by the transfer of such work were neither laid off nor terminated, backpay shall be computed in accord with *Ogle Protection Service*, 183 NLRB 682, 683 (1970), enfd. 444 F.2d 502 (6th Cir. 1971).

and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at the Hummels Wharf, Pennsylvania, and South Plainfield, New Jersey locations copies of the attached notice to employees marked "Appendix"[8] and mail copies of the notice to Teamsters Local Union No. 107, affiliated with International Brotherhood of Teamsters, AFL–CIO, and to all unit employees who were employed on May 13, 1992. Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by authorized representatives of Proctor Express Incorporated of New Jersey, B.A. Proctor, Inc., and Rutgers Express, Inc., shall be mailed and shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the posted notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facilities involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since May 13, 1992.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize and bargain collectively with Teamsters Local Union No. 107, affiliated with International Brotherhood of Teamsters, AFL–CIO, as the exclusive collective-bargaining representative of Proctor Express' drivers, platform employees, and mechanics at Pennsauken, New Jersey (the unit) by: (1) unilaterally discontinuing payments to contractual benefit funds on behalf of the unit employees; (2) unilaterally discontinuing payments to unit employees for vacations, sick pay, or similar established terms and conditions of employment; and (3) unilaterally transferring platform work previously performed by the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole, with interest, the unit employees affected by our unilateral transfer of work that previously had been performed by those employees.

WE WILL pay, with interest, all 1992 vacation and sick-day pay due to the unit employees.

WE WILL pay all delinquent contributions for the unit employee hours worked from December 1, 1991, through May 13, 1992, to the pension trust fund and health and welfare trust fund established by the collective-bargaining agreements between Proctor Express Incorporated of New Jersey and the Union, which agreements expired March 31, 1994, and WE WILL reimburse, with interest, unit employees for any expenses ensuing from the failure to make such contributions.

PROCTOR EXPRESS INCORPORATED OF NEW JERSEY, B.A. PROCTOR, INC., AND RUTGERS EXPRESS, INC.

Carmen P. Cialino Jr., Esq., for the General Counsel.
John A. Craner, Esq., of Scotch Plains, New Jersey, for the Respondents.
Thomas H. Kohn, Esq., of Philadelphia, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge. This case under the National Labor Relations Act (the Act) was tried before me in Philadelphia, Pennsylvania, on December 7–8, 1993. On May 20, 1992,[1] the charge under the Act in Case 4–CA–20745 was filed against Proctor Express Incorporated of New Jersey, B.A. Proctor, Inc., and Rutgers Express, Inc.

[1] All dates subsequently mentioned are between December 1991 and September 1, 1992, unless otherwise indicated.

(separately Proctor, B.A. Proctor, and Rutgers, and collectively the Respondents), by Teamsters Local Union No. 107, a/w International Brotherhood of Teamsters, AFL–CIO (the Union). On February 23, 1993, the General Counsel of the National Labor Relations Board (the Board) issued a complaint and notice of hearing (the complaint) alleging violations of Section 8(a)(5) and (1) of the Act by the Respondents.

The Respondents duly filed an answer to the complaint admitting jurisdiction of this matter before the Board, admitting the status of certain supervisors within the meaning of Section 2(11) of the Act, and admitting certain other matters, but denying the commission of any unfair labor practices.

On the entire record and my observation of the demeanor of the witnesses, and after considering the briefs that have been filed, I make the following findings of fact[2] and conclusions of law.

I. JURISDICTION

At all material times, Rutgers, a New Jersey corporation, has been engaged in the interstate transportation of clothing and other commodities. During the year preceding issuance of the complaint Rutgers maintained facilities in East Brunswick, New Jersey (the East Brunswick facility), and Hummels Wharf, Pennsylvania (the Hummels Wharf facility). In conducting those business operations, Rutgers derived gross revenues in excess of $50,000 for the transportation of freight from New Jersey and Pennsylvania directly to points outside New Jersey and Pennsylvania. Therefore, at all material times Rutgers has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. As the Respondents further admit, the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

1. Background and allegations of the complaint

Proctor is a trucking company that exists, but it is not now operating, and it is now in bankruptcy proceedings. Until May 15, Proctor operated at a terminal in Pennsauken, New Jersey, for many years. Until March 14, Proctor was owned by the Johnathan Lane family of nearby Philadelphia. During the last few years of the Lanes' ownership, Proctor had a collective-bargaining relationship with the Union as the statutory representative of its truckdrivers, platform employees, and mechanics (the unit).[3] Proctor and the Union were parties to a collective-bargaining agreement effective by its terms from September 14, 1991, through March 31, 1994. That agreement was a supplemental agreement to the National Master Freight Agreement, effective by its terms from April 1, 1990, through March 31, 1994. The agreements (as I shall collectively call them) required monthly payments to the Teamsters Health and Welfare Fund of Philadelphia (the health and welfare fund) and the Teamsters Pension Fund of Philadelphia (the pension fund). The amounts of the monthly payments to both funds were based on the number of hours worked in the previous month by unit employees; payments were due on the 28th of the month following each month in which any unit employees worked. During 1991 the financial position of Proctor declined; two of the creditors that Proctor stopped paying during 1991 were the health and welfare and the pension funds.

For many years Bruce Arbeiter has been sole owner and president of Rutgers; Arbeiter's son-in-law, Steve Distel, is Rutgers' vice president. On February 13, Arbeiter and his daughter, Alyson Distel, as equal-share owners, incorporated B.A. Proctor; Arbeiter and his daughter became directors of B.A. Proctor at the same time. Arbeiter testified that the purpose of creating B.A. Proctor was to purchase Proctor. On March 14, B.A. Proctor did purchase Proctor; Arbeiter became president of Proctor, and his daughter became secretary-treasurer. To summarize all of the relationships and proprietary interests involved:

Bruce Arbeiter (father of Alyson Distel)	100% shareholder of Rutgers President/Treasurer of Rutgers 50% shareholder of B.A. Proctor Director of B.A. Proctor President of Proctor since March 14
Alyson Distel (daughter of Bruce Arbeiter)	50% shareholder of B.A. Proctor Secretary of B.A. Proctor Director of B.A. Proctor Secretary-Treasurer of Proctor since March 14
Steven Distel (husband of Alyson Distel)	Vice President of Rutgers

Under the new ownership, Proctor continued to recognize and bargain with the Union until May 13, at which time Proctor permanently laid off all unit employees. On May 15 Proctor closed the Pennsauken terminal, and Rutgers assumed possession of all of the real and personal property of Proctor. On August 25, Arbeiter placed Proctor in Chapter 11 bankruptcy.

The complaint alleges some pre-March 14 unfair labor practice by Proctor and some post-March 14 unfair labor practices by all three Respondents. On a theory that a single-employer relationship exists between the Respondents, the General Counsel seeks from Rutgers and B.A. Proctor remedies for all of the alleged unfair labor practices, even though Arbeiter (through B.A. Proctor) did not purchase Proctor until March 14 and Rutgers (and B.A. Proctor) could have taken no part in the alleged pre-March 14 unfair labor practices that were committed by Proctor.

More particularly, the complaint alleges as violations of Section 8(a)(5): (1) Proctor unilaterally modified the collective-bargaining agreements that Proctor had with the Union by failing to make any of the required monthly payments to either the health and welfare fund or the pension fund for employee hours worked during the months of December

[2] Portions of the transcript have been electronically reproduced. Proper punctuation of transcript quotations is supplied only where necessary to avoid confusion.

[3] The complaint alleges, Respondents admit, and I find and conclude that a unit of Proctor's truckdrivers, platform employees, and mechanics is appropriate for the purposes of collective bargaining under Sec. 9(b).

1991 and January and February 1992.[4] (2) Since mid-April, Rutgers and B.A. Proctor, as well as Proctor, have unilaterally modified the agreements by failing to make payments to the funds based on the employee hours worked through May 13 (the last day that Proctor employed any of the unit employees). (3) Between mid-April and May 13, the three Respondents unilaterally transferred work that had been done by Proctor employees at the Pennsauken terminal to employees of Rutgers at other terminals. (4) After the Pennsauken terminal was closed, the three Respondents unilaterally removed to other terminals owned by Rutgers certain pickup and delivery work for two of Proctor's long-standing customers. (5) Since May 13, the three Respondents have failed to pay some of the Proctor employees vacation and sick-day pay that had accrued under the agreements.

In denying the commission of any unfair labor practice, Respondents assert several factual and legal defenses that will be addressed infra.

Before any of the events in issue came to past, Proctor picked up and delivered freight within a 250-mile radius of Pennsauken—to the north, Kingston, New York; to the west, New Castle, Pennsylvania; to the south, Washington, D.C; and to the east, the Atlantic seaboard. In addition, Proctor did "line haul" work, the transfer of freight between terminals (without delivery to ultimate consignees). Excel Logistics is a large grocery wholesaler that has a terminal in Mechanicsburg, Pennsylvania (just outside of Harrisburg). A large part of Proctor's business was the line haul work of picking up freight at the Excel terminal and delivering it to Respondent's terminal in Pennsauken for reloading and ultimate delivery in the Philadelphia area. Proctor employed one unit employee, Steve Bretz, at the Excel terminal. Bretz (who lived in the area) received Excel freight in an area of the Excel terminal that was leased by Proctor. Bretz counted the freight and prepared it for loading; then Bretz would load Proctor trailers that had previously been dropped there by Proctor drivers. The Proctor drivers would take the loaded trailers and deliver it to Proctor's Pennsauken terminal. At Proctor's Pennsauken terminal, the freight would be broken down for shipments to individual consignees. The work of breaking down freight according to consignees and loading it on other trucks is called "platform work." (In this case, the platform work at Mechanicsburg was for line-haul shipments; the platform work at Pennsauken was for ultimate delivery.)

2. Events in issue

On February 19, Arbeiter and Steve Distel[5] met with Union Business Agents Billy Hamilton and Edmund Woods; Woods is also a trustee of both the health and welfare and the pension funds. Woods testified (without contradiction) that Arbeiter told the gathering that he was considering purchasing Proctor Express. Woods replied that, if Arbeiter did that, he would be responsible for nearly $90,000 in pension, and health and welfare, debts that Proctor had incurred, but not paid, since mid-1991.

Arbeiter testified (without contradiction) that during the February 19 meeting:

> I asked for a 20 percent wage reduction, and I asked for some help on the health and welfare, which as I understood it at the time, was about five dollars per hour per man. . . . I told Eddie Woods that there was no way that this Company could survive at the current wage level that they were paying. That we needed some help. And he said that he didn't think 20 percent [would] fly, but he would see what he could do.

On February 20, Arbeiter and Distel met with the employees of Proctor at the Pennsauken terminal; present for the Union were Woods, Business Agent Nick Pico, and Michael Borradaile, the Union's steward for the unit employees. According to Borradaile:

> Mr. Arbeiter introduced himself to the men. And he told us he was in negotiations to buy Proctor Express, and basically he wanted a 20 percent cut . . . [i]n wages. The men were in a total uproar. At that point, they said no.

On February 22, Arbeiter, met with Pico and Union President Thomas Ryan. Several agreements were reached which were subject to ratification by the unit employees. Arbeiter testified (and it is not contradicted because neither Pico nor Ryan testified) that at this meeting the union representatives agreed to reductions of the contractual wage rates and sick-day pay benefits. The parties also reviewed maps of New Jersey and Pennsylvania and agreed to divide between Proctor and Rutgers the New York-to-Maryland areas that both Rutgers and Proctor had previously serviced. The February 22 agreements were later reduced to writing in a document which states:[6]

Amendment to Proctor Agreement

Rate of Pay:	$13.50 per hour until April 1, 1993 April 1, 1993, increase of $.45 per hour
Sick Days	3 per employee
Line Haul	Terminal to terminal not to be done by Proctor Express Pennsauken Terminal Thirty (30) day window period on work and boundaries

Wages had been $15.23 per hour, and there had been 5 contractual sick days under Proctor's agreements with the Union.

[4] The complaint does not allege as violative Proctor's failure to make contributions to the funds based on any employee hours worked before December 1991. (This is so notwithstanding the fact that October's payment was not due until November 28, 1991, a date well inside the 10(b) limitations period of the May 20 charge, and November's payment was not due until December 28, 1991. There was no motion to amend the complaint at trial to cover the unpaid contributions for those 2 months.)

[5] Hereafter, all references to "Distel" are to Steve, rather than Alyson, unless otherwise indicated.

[6] Hamilton signed a draft of the February 22 agreement on February 26. Arbeiter never signed the agreement; however, the parties are in agreement that Arbeiter adopted it and treated it as if he had signed it, and Respondent relies on the agreement as part of its defenses herein.

The "boundaries" mentioned in the February 22 agreement were recorded by the parties' drawing lines on the maps of Pennsylvania and New Jersey; roughly, the map lines separated southern Pennsylvania, southern New Jersey, and Maryland from northern Pennsylvania, northern New Jersey, and New York State.[7] The parties agreed that, for 30 days after the purchase of Proctor (which, again, turned out to be March 14), whether orders were received by Proctor or Rutgers, Rutgers would make pickups and deliveries north of the lines, and Proctor would make pickups and deliveries south of the lines. Thirty days after the purchase of Proctor (or, at the end of the "window period"), the boundary lines would be reviewed. Additionally, the parties agreed that Rutgers employees would pick up all Excel freight at the Mechanicsburg terminal and take it to the Pennsauken terminal (as the "terminal to terminal" reference in the February 22 agreement indicates), although Bretz would continue to do the platform work involved at Excel's Mechanicsburg terminal. (This summary of the parties' February agreements is in accord with the undisputed testimony of Arbeiter.) The employees ratified the February 22 agreements at a union meeting on March 1.

At some point before March 4, Rutgers leased a terminal in Hummels Wharf, Pennsylvania, but that terminal did not become operational until some time in April.[8] Hummels Wharf is about 50 miles north of Mechanicsburg, where Excel is located; therefore, Hummels Wharf is much closer to Mechanicsburg than is Pennsauken.[9] Union Steward Borradaile testified that on March 4 he and (unnamed) business agents met with Arbeiter and Distel to discuss the boundaries that had been agreed upon at the February 22 meeting. According to the uncontradicted testimony of Borradaile:

> At the meeting, we discussed the 30 days. There would be a 30 day moratorium. At that time, Mr. Distel said there would be so much work coming to us, that he had no problem with any boundaries, and we would have more than we could handle. . . . But he did make it [clear] that the line haul would be done with the Hummels Wharf drivers. Other than the Proctor's drivers. It would not be done by us. . . . Then it would be reopened for negotiation after the 30 days.

Neither Arbeiter nor Distel disputed this testimony. (Although Arbeiter did not testify to the fact, and Pico and Ryan did not testify at all, Arbeiter must have told Pico and Ryan on February 22 that there would be plenty of work for the unit employees if the boundaries were adopted. There is no other reason apparent for the Union representatives' agreement to the drastic reductions in contractual benefits and geographic scope of the unit work, especially in view of the "uproar" with which the unit employees responded when, only 2 days before, Arbeiter made the proposed reductions directly to them.)

Immediately upon the March 14 purchase of Proctor, Rutgers drivers began picking up all freight at the Excel terminal in Mechanicsburg that formerly would have been picked up by Proctor drivers; then the Rutgers drivers took that freight that was to be delivered south of the February 22 map lines to Pennsauken where, as "platform work," it would be broken down for ultimate delivery by Proctor employees. Excel freight that ultimately was to be delivered north of the lines was taken to Rutgers East Brunswick terminal where it was broken down for delivery, and it was then delivered by Rutgers drivers.

At some point in April, after Rutgers' Hummels Wharf terminal became operational, Rutgers drivers began taking all of the Excel freight there. As Arbeiter described the new process:

> [S]ometime in April . . . the Rutgers drivers would pick the freight up after Steve Bretz loaded the trailer and take it up to Hummels Wharf where the freight was stripped off the trailer and set up for ultimate delivery. Most of that freight was appointment freight. . . . Excel Logistics is a supplier of grocery houses and drug stores. Their customer list includes Proctor and Gamble, General Foods. Stuff that goes into grocery stores. That's what they specialize in. And grocery stores don't take merchandise in unless you have an appointment, in most cases.

That is, "sometime in April," at Hummels Wharf, the freight was broken down for loading on trailers according to how ultimate deliveries, south or north of the map lines, were to be made. As before, the trailers destined for terminals, or ultimate delivery, north of the lines were sent to Rutgers' terminal in East Brunswick. And, as before, the trailers destined for south of the lines were dropped at the Proctor terminal in Pennsauken, and the unit drivers made the ultimate deliveries of that freight. But, unlike before, when the freight arrived at Pennsauken (or East Brunswick), the platform work required for ultimate delivery had already been done; it had been done at Hummels Wharf by Rutgers employees. Arbeiter testified that this procedure was more efficient, and it was made possible by the fact that the Hummels Wharf terminal was much larger than the space that Proctor leased at Mechanicsburg.

The new procedure, however, had the effect of eliminating all of the Pennsauken platform work on the Excel freight that formerly had been done by Pennsauken platform employees. This shift of the Excel-freight platform work from Pennsauken to Hummels Wharf is the subject of an 8(a)(5) allegation of the complaint.

On April 22, a meeting was held on several grievances that had been filed by Proctor employees. Present for Respondents were Arbeiter and Distel and Respondents' counsel. Present for the Union were Ryan, Pico, Woods, and Borradaile. By the date of this meeting the "window" period on the February 22 boundary agreements had expired,[10] and the parties discussed the boundaries again. Ultimately, the grievance discussions and the boundary discussions resulted in the withdrawal of all grievances and the essential reaffir-

[7] See R. Exhs. 7 and 7(a).

[8] Arbeiter placed the date of the Hummels Wharf lease in April, but, as the following undisputed testimony of Borradaile demonstrates, the lease was a virtual certainty, if not a reality, by March 4.

[9] Hummels Wharf does not appear on R. Exh. 7; it is just north of Selinsgrove, Pennsylvania, which does appear on the map.

[10] It had expired by its terms on April 13, or 30 days after the purchase of Proctor.

mation of the February 22 boundary agreements,[11] this time on a permanent basis.

No party offered copies of the grievances that were considered at the April 22 meeting. From the testimony, it is safe to conclude that the grievances included some that concerned the loss of delivery work north of the map lines; however, whether the grievances also included one over the loss of the platform work at Pennsauken is a factual issue that must be determined by the circumstances. The question is important because Respondents contend that, at the April 22 meeting, by withdrawing the grievances, the Union consented to the new procedures at Hummels Wharf that had the effect of eliminating the platform work on that portion of the Excel freight that was continuing to be sent to Pennsauken (after the February 22 agreements).

According to Woods, at the April 22 meeting:

> We had the president of the Union [Ryan] there and Nick Pico there, to come up with some kind of boundaries. When we did get the boundaries, they were initialed. When we left there, it was led to believe that Mr. Arbeiter, when he said that we had plenty of work,[12] we were happy. . . . [T]he grievances were dropped.

Woods testified that he could not recall any discussions of Excel's platform work at Pennsauken, or loss of that work at the April 22 meeting. Borradaile flatly denied that there was any such discussion.

Distel testified, but he did not testify about what was said, or not said, in the April 22 grievance meeting about the platform work for Excel freight. The attorney did not testify. Arbeiter testified that the Union agreed to having the platform work being done in Hummels Wharf. When I asked how they had agreed, Arbeiter answered:

> We told them what we're doing, and at that point, I believe we were already doing it. They didn't have any problem with it. They didn't say stop it. They didn't say you're violating the collective bargaining agreement. They didn't say how come you're doing that. They didn't say anything like that. They were well-aware of what we were doing. There were never any secrets at Proctor.

I asked further, and Arbeiter testified:

> JUDGE EVANS: . . . At this meeting where you discussed this and told them how you were operating, was there any discussion of the operation in Hummels Wharf, out loud, so, had I been there, I would have heard it?
>
> THE WITNESS: No.

I credit Borradaile.

(An allegation of the complaint is that, "on or about April 23" Arbeiter agreed to pay all of the December-through-March obligations to the union funds. This is a superfluous allegation but, for possible purposes of review, I make the following credibility resolutions: Borradaile and Woods testified that at the April 22 meeting Arbeiter made an unconditional agreement to pay all arrears to the funds. Arbeiter, however, testified that he asked Woods for a reduction of rates and, "Eddie Woods said, 'Absolutely, not.' And that was the end of it. It never went any further." It is clear enough that Arbeiter had no intention of making any fund payments, and, as none of the grievances considered at the April 22 meeting concerned the funds, he had nothing to gain by then (or at any other time) telling the Union that he would make such payments; I credit Arbeiter's testimony over that of Borradaile and Woods. Another credibility resolution that I make for possible purposes of review involves a telephone conversation, on or a few days after the April 22 meeting, between Arbeiter and Frank Duffy, the audit department manager of the Union's health and welfare and pension funds. Duffy testified that he told Arbeiter that Proctor was in arrears for contributions based on unit hours worked since December 1991, and Arbeiter replied that "[h]e would make every effort to resolve that." Arbeiter testified that Duffy only asked for permission to come to the Proctor office and make an audit. Duffy was the more credible witness, and I do credit his testimony.)

The last day of employment for the unit employees was Friday, May 13. On Sunday, May 15, Respondents had all of Proctor's equipment removed from the Pennsauken terminal and taken to the East Brunswick terminal of Rutgers. Distel supervised the removal of the equipment. The Union and the employees were given no prior notice of the terminal's closure and the removal of the equipment. May 15 was the day for the Union's monthly meeting. An employee, by chance, saw the equipment being removed and called Woods at the Union's hall. Woods went to the Proctor premises and observed what was happening. When he saw Distel, he asked, "Well, what are you going to do about the vacations, the sick days, any monies owed." Distel replied, "You'll have to talk to Mr. Arbeiter." Arbeiter testified that the equipment of Proctor was removed to East Brunswick for its protection; Arbeiter denied that Rutgers subsequently used any of the equipment, all of which was turned over to a bankruptcy court after Proctor filed for Chapter 11 proceedings on August 25.

On May 22, Union Funds Administrator Duffy sent Arbeiter, as president of Proctor, a demand for all contractually delinquent contributions, including those not in issue here.[13] As noted, the complaint alleges 8(a)(5) violations by Respondents' failures to pay health and welfare or pension fund contributions that were contractually required for the hours worked by the unit employees during the period between December 1 and May 13. None of the contributions in issue have been made by any of the Respondents. Respondents disclaim liability for payment of any of the obligations for contributions that accrued before the March 14 purchase of Proctor by Arbeiter (through B.A. Proctor) on grounds that: (1) The failures to make fund contributions cannot lawfully be the subject of unfair labor practice charges, but only breach of contract allegations in other forums; (2) Proctor did not have the funds to pay the claims; (3) B.A. Proctor and Rutgers are not in a single-employer relationship with Proctor and, even under that theory of Gen-

[11] See G.C. Exh. 8, another map on which essentially the same boundary lines were drawn.

[12] Again, Arbeiter must have told this to Pico and Ryan on February 22.

[13] See fn. 4.

eral Counsel's case, they have no responsibility to pay benefits that accrued before the purchase of Proctor; and (4) even if the entities were in a single-employer relationship, that factor is not a valid basis for imposing liability upon B.A. Proctor and Rutgers for the obligations that Proctor had incurred before, or after, the March 14 purchase of Proctor by Arbeiter (through B.A. Proctor).

Also as noted, the complaint alleges 8(a)(5) violations by Respondent's not paying certain sick pay and vacation pay due to the unit employees under Proctor's agreements with the Union. The agreements between Proctor and the Union required that all sick days not taken by March 31 (either as sick days, as such, or as "personal" days off) were to be paid at straight-time rates. Also, employees who were laid off were to be paid earned vacation days on a pro rata basis. At trial, Respondents admitted that they had not paid all employees' sick days and vacations that had been earned, but not paid, before the Pennsauken terminal was closed on May 15. As well as asserting the defenses on the single-employer issue, and as well as asserting that the sick pay and vacation pay questions can only be raised in breach of contract actions, Respondents contend that they are not liable for payment of any of the sick pay or vacation benefits that otherwise would have been paid by Proctor because: (1) The unit employees who did not receive those benefits had failed to claim such before the closure of the terminal; and (2) The vacation-pay clauses of the Proctor agreements do not apply to layoffs caused by a cessation of business.

After the close of Proctor, Rutgers performed services for some of Proctor's former customers, including specifically Excel and Stockham Valve (which is also in Pennsauken). The General Counsel contends that Respondents' assignment of this work to Rutgers employees was a unilateral relocation of unit work in violation of Section 8(a)(5). Respondent's contend that, after the Proctor terminal was closed, Rutgers sought the work of Excel and Stockham Valve through a competitive bidding process; in effect, this was new work, and there was no relocation, as such.

Interrelations of Operations

In support of the single-employer relationship theory of the complaint, General Counsel introduced certain evidence in an effort to show that, before closure of Proctor's Pennsauken terminal and operations, Respondents had effectively combined the operations of Proctor, Rutgers, and B.A. Proctor.

Allen Porter was Proctor's terminal manager from April 1991 until the terminal closed on May 15. As terminal manager for Proctor, Porter was in charge of all aspects of the operations, including hiring, firing, and supervising all employees, unit and nonunit. Porter testified that in early March he met with Arbeiter and Distel at the Pennsauken terminal. Arbeiter gave Porter a copy of the February 22 agreement, showed him the February 22 maps, and told him that the agreements (including boundary agreements) were to be put into effect as soon as the purchase of Proctor was completed. Porter further testified:

> I was told [by Arbeiter] that I would report directly to him, that he was the owner. That eventually Steve Distel would take over and oversee the operations at the Pennsauken facility. . . . I would eventually report to him. . . .
>
> I was shown a copy of the [February 22] agreement he had negotiated with the Union reducing the wage rates and the sick days, and I was to follow that. . . .
>
> I was told to answer the phone, "Rutgers Proctors," so as not to confuse the Rutgers customers when they called into Proctor Express—on their behalf. . . .
>
> [Arbeiter] told me that the name of Proctor would remain for six to nine months, in case there was any hidden liability. At which time, it would cease to exist and become Rutgers Express.

Porter testified he told everyone in the office to answer the telephone "Rutgers Proctor." Of course, it was Proctor customers that were calling the Proctor terminal, and some asked what the reference to "Rutgers" was; Porter testified that he told customers that Rutgers was in the process of taking over the business. Porter testified that, as he managed the Pennsauken terminal between March 14 and May 15, he adhered to the February 22 agreement, both in terms of the boundaries (which became permanent on April 22, as described supra) and the reductions of benefits.

Arbeiter and Distel denied telling Porter to have Proctor staff answer the telephone "Rutgers-Proctor," and Respondents argue that, since no Rutgers customers would have called the Proctor terminal for any reason, it would have made no sense for Arbeiter to have issued such an instruction. I disagree. Unless Arbeiter purchased Proctor just to siphon off its accounts, it stands to reason that he wanted to make Proctor, in some form, under some name, a viable entity.[14] As this is the case, the "Rutgers-Proctor" telephone-answering instruction to Porter would have made perfect sense because Respondents would have wanted the Proctor customers to become accustomed to hearing "Rutgers." Finally, although the "confusion" reason for the instruction does not now appear altogether logical in terms of what ultimately happened, Porter had no apparent reason to lie. I credit Porter's testimony about the instruction and his other testimony previously described.

Porter (and Arbeiter) testified that, during the March–May period, Arbeiter made decisions to purchase and sell different tractors for Proctor. Porter testified that in mid-March, Distel called him and told him that:

> Before any major purchases or decisions are made, I was to contact him if there's a mechanical problem. A Proctor's mechanic was to contact the Rutgers' mechanic, and Mr. Distel would discuss it with the Rutgers' mechanic, and they would let me know what to do with it.

Porter also testified that Distel told him that, before he made any major fuel or tire purchases for Proctor, he was to call Distel.

Porter testified that there were interchanges of trailers at the Pennsauken terminal, but "no more than five to ten percent" of the trailers at the Pennsauken terminal were Rutgers trailers at any given time during the March–May period. Porter testified that he was not instructed to keep any records of the use of Rutgers trailers at the Pennsauken terminal.

[14] Borradaile and Woods credibly testified that Arbeiter told the employees and union representatives that he did intend to merge the companies.

Porter also testified that a Proctor tractor was used by Rutgers employees to take trailers from Excel to East Brunswick, and several Proctor trailers were used to transfer freight to Rutgers' East Brunswick terminal from Excel. Porter testified that one Proctor truck was sent to Rutgers for repair and "They used it in their system for several weeks before it even got repaired." A Rutgers tractor that broke down on the way to Pennsauken was towed to the Pennsauken terminal for repair by the Proctor mechanic; Rutgers not billed for that work, according to Porter's knowledge, and Respondents produced no records to establish that any such charges were made. Porter testified that Arbeiter cut down the seniority list that was used for calling in Proctor employees; Arbeiter told him that, "we weren't going to have any work for them anymore."

I found credible all of this testimony by Porter, most of which is not challenged by Respondent's witnesses.

When Proctor and Rutgers employees were bringing tractors and trailers back and forth between the terminals, they did at least some work at each terminal (pulling in, hooking up, pulling out, and handling any attendant paperwork and problems); however, on cross-examination, Porter acknowledged that no Rutgers employees were assigned to work out of the Proctor terminal and no Proctor employees were assigned to work out of the Rutgers terminal.

Distel generally denied giving any orders to Proctor personnel, including Porter, but he did not deny the specific conduct and statements attributed to him by Porter, except for the instruction to answer the Proctor telephone "Rutgers-Proctor," as discussed.

Arbeiter testified that Rutgers and Proctor had separate banking accounts; Rutgers never lent money to Proctor; separate payrolls were maintained; the companies used different lawyers; money that Proctor got from sale of trucks was used to buy other trucks for Proctor; bills due to be paid by Proctor were sent to East Brunswick, and Alyson Distel signed the checks for Proctor, but they were drawn on Proctor accounts.

Arbeiter further testified when he took over Proctor, Proctor had tremendous debt; he paid off some of that debt by economic measures, such as selling unneeded trucks and downsizing operations. As he testified:

> We got rid of a lot of people who were just malingerers there. Proctor, when we took over, had—I believe they had eight Union people working there, but they had three mechanics around the clock Now, to run eight people, which included, I think, one or two people on the dock, you really didn't need three mechanics around the clock. They weren't running around the clock, so we trimmed expenses. I think in the initial month, we trimmed expenses to almost $10,000 a week.

Arbeiter testified that he gave these instructions to insure that Proctor did not spend money unnecessarily.

While the Proctor terminal was open, Excel and other freight was exchanged between Proctor and Rutgers at the Hummels Wharf Pennsauken and East Brunswick terminals. The General Counsel contends that the way that these exchanges were handled demonstrates that Proctor and Rutgers were acting at closer than at arms' length. Respondents contend that all freight exchanges were transactions at an arm's length because they were pursuant to an interline agreement between the Rutgers and Proctor. An interline agreement is one whereby carriers operating in different regions agree to share revenues when one carrier picks up goods in one region and the freight is transferred to the other carrier which delivers it in the other region. Respondents contend that, on March 10, or 4 days before Rutgers (through B.A. Proctor) purchased Proctor, Proctor and Rutgers entered such an agreement, also on an arms'-length basis. Distel signed the March 10 interline agreement for Rutgers, and Porter signed for Proctor. Porter testified, without contradiction, that Distel told him to sign the agreement. Porter testified that he did so because Arbeiter had told him that Distel was scheduled to be his boss (which, as Distel's instructions to Porter show, turned out to be the case).

The interline agreement between Rutgers and Proctor called for weekly and monthly accountings and payments for services that each company performed for the other. Arbeiter acknowledged that there were no checks reflecting such payments. Distel testified that there were offsets which obviated the necessity of payments in some weeks, and Rutgers filed a claim in Proctor's bankruptcy proceedings for any balances that Proctor owed to Rutgers. General Counsel subpoenaed billings between the two companies; none were produced reflecting services before mid-April. Arbeiter testified that there were other such billings, but the file containing them had been lost.

B. *Analysis and Conclusions*

1. The single-employer issue

The General Counsel contends that the Respondents are in a single-employer relationship, so that two, Rutgers and B.A. Proctor, may be legally required to remedy any unfair labor practices that were committed by Proctor, before or after its purchase on March 14.

In *Emsing's Supermarket*, 284 NLRB 302 (1987), enfd. 872 F.2d 1279 (7th Cir. 1989), one supermarket, Rocky's, was held to be in a single-employer relationship with another, Emsing's. The issue arose because Emsing's had repudiated agreements with a union in violation of Section 8(a)(5), and then it had gone out of business without remedying those unfair labor practices. The General Counsel sought remedy for Emsing's unfair labor practices from Rocky's. The Board stated:

> In deciding the single-employer issue, the judge relied on the four criteria the Board has traditionally applied when making such a determination. These factors are common control of labor relations, common management, common ownership, and interrelations of operations.[3] None of these factors, alone, is controlling, nor need all of them be present. Single-employer status ultimately depends on "all the circumstances of the case" and is characterized by the absences of the "arm's-length relationship found among unintegrated companies."[4] Stated otherwise, the fundamental inquiry

is whether there exists overall control of critical matters at the policy level.[5]

[3] *Radio Technicians Local 1265 v. Broadcast Service of Mobile*, 380 U.S. 255, 256 (1965) (per curiam); *Shellmaker [Inc.]*, 265 NLRB 749, 754 (1982); *American Stores Packing Co.*, 277 NLRB 1656 (1986).

[4] *Blumfield Theaters Circuit*, 240 NLRB 206, 215 (1979), enfd. 626 F.2d 865 (9th Cir. 1980).

[5] *Soule Glass Co.*, 652 F.2d 1055, 1075 (1st Cir. 1981); *Sakrete of Northern California v. NLRB*, 332 F.2d 902, 907 (9th Cir. 1964), cert. denied 379 U.S. 961 (1965), enfg. 140 NLRB 765 (1963).

Emsing's Supermarket was reaffirmed by the Board in *Il Progresso Italo Americano Publishing Co.*, 299 NLRB 270 (1990); specifically reaffirmed was the statement that, in deciding single-employer issues, the fundamental inquiry is the existence of "overall control of critical matters at the policy level."

In *Emsing's Supermarket*, a single-employer relationship was found, even though the principal elements evincing an interrelationship of Emsing's with Rocky's were those involved in the closing of the former. The Board stated:

> Here, the evidence relating to common control of labor relations, common management and common ownership is overwhelming. Thus, even if the interrelation of the operations of Emsing's and Rocky's be deemed minimal, a finding of a single employer is nonetheless warranted. [284 NLRB at 304.]

Respondents argue that, even where there is common control of labor relations, common management and common ownership, a high degree of operational interrelation among business entities must be established before a single-employer relationship can be found. This argument ignores the last-quoted language from *Emsing's Supermarket*. To conclude herein that a single-employer relationship exists between the Respondents, only a minimal degree of operational integration need be found because of the clear evidence of common control of labor relations, common management and common ownership.

The elements of common ownership, control, and management are admitted. Arbeiter owned all of Rutgers and half of B.A. Proctor which, in turn, owned all of Proctor. (The only part of B.A. Proctor that Arbeiter did not own was owned by his daughter, Alyson Distel.) Arbeiter was president of Rutgers; he was one of two directors of B.A. Proctor; and he became president of Proctor upon its purchase. Also, upon purchase of Proctor by B.A. Proctor, B.A. Proctor's other director, Alyson Distel, became Proctor's secretary-treasurer.

On brief, Respondents state:

> Turning to the facts of this case, there is no need to argue that the ownership and management is or is not common; or whether there is or is not centralized control of labor relations. . . . Arbeiter (through B.A. Proctor) operated Proctor for about 60 days, at which time Proctor went out of business.[15]

In view of this concession on brief, which is supported (if not required) by the many factors recited herein, it can only be concluded that "overall control of critical matters at the policy level" was possessed and exercised by Arbeiter.

A minimal degree of operational interrelation, and more, has been proved by General Counsel. Beginning with the March 14 purchase of Proctor, and implementation of the February 22 agreements, every piece of freight that was loaded at Excel (in Mechanicsburg) on to a Rutgers truck was loaded by a Proctor employee, Bretz. Then the Rutgers' trucks carrying Excel freight that was bound for south of the map lines were driven to Pennsauken by Rutgers drivers who delivered that freight (back) to other Proctor employees, the platform employees or the truck-driving employees at the Pennsauken terminal.[16] This was an interrelation of the businesses, and, as Excel was formerly Proctor's largest account, this was more than a minimal.[17]

That an interline agreement existed between the parties does not detract from the fact that this interrelation of operations existed. The cited authorities on the single-employer relationship issue do not exempt from consideration interrelationships of operations that are conducted pursuant to contracts. Moreover, even if in some circumstances interline agreement agreements would be relevant evidence of an arm's-length relationship, this interline agreement is not; this contract was drawn up and presented to Porter to sign at the direction of Distel,[18] billings were made only belatedly,[19] and no payments were made pursuant to the interline agreement.

Finally, Proctor employees repaired Rutgers trucks and Rutgers employees repaired Proctor trucks, all without compensation; by the telephone-answering instruction of "Rutgers-Proctor," the two entities were held out to be one; when the Proctor terminal was closed, the equipment was moved by Rutgers and stored by Rutgers, again without compensation. And, as the unannounced evacuation of the Proctor terminal was being conducted and Woods asked Distel how the Proctor employees were to be compensated for their accrued benefits, Woods was referred to Arbeiter whose only remaining business address was the office of Rutgers. These factors, especially the factors involved in closing the business of

[15] Br. 54, 55.

[16] The Rutgers deliveries to Pennsauken were to the platform employees before Rutgers reorganized the Hummels' Wharf terminal and caused all platform work to be performed there; afterwards, the Pennsauken deliveries were to the Proctor drivers.

[17] And this interrelation came about through the February 22 and April 22 agreements, and those agreements came about because of Arbeiter's repeated promises that, if freight was handled this way, there would be plenty of work for everybody. That is, Respondents are now contending that the operations were not interrelated, even though Arbeiter had promised the employees that, if they gave up work north of the map lines (and wage and benefit rights), there would be plenty of work for everybody because the operations were going to be interrelated.

[18] That Distel then had no official position with Proctor is no defense. See *Teamsters Local Union 526 (Pen Yan Express)*, 274 NLRB 449 (1985), where a union representative who had been elected, but had not taken office, engaged in conduct that bound the union because he acted as if he had the union's authority and the union did not later repudiate his conduct. Analogously, Arbeiter had told Porter that Distel had been, in effect, elected to take over the operations of Proctor.

[19] I do not believe Arbeiter's testimony that the files of early billings were lost.

Proctor,[20] fortify my conclusion that the jointly owned, controlled, and managed operations of Proctor and Rutgers were more than minimally interrelated.

In summary, in this case, there is no question that the policy level of all three Respondents consisted of Arbeiter, and only Arbeiter. Arbeiter is sole owner and president of Rutgers; he is president of Proctor, and as such, answers to no one but himself. Arbeiter is "only" half owner of Proctor (through the shell of B.A. Proctor), but the other half owner is his daughter with whom, according to this record, Arbeiter never had to consult about anything. Therefore, the fundamental inquiry as stated by *Emsing's Supermarket* and reaffirmed by *Il Progresso*, is answered by concluding, as I do, that the overall control of critical matters for all three Respondents is in the hands of Arbeiter. I therefore find and conclude that Proctor, B.A. Proctor, and Rutgers are in a single-employer relationship, as alleged, and Rutgers (and B.A. Proctor) must remedy any unfair labor practices by Proctor.[21]

2. Payments to union funds

It is not disputed that, from December 1 through March 13, Proctor employees worked hours for which Proctor made no contributions to the Union's health and welfare and pension funds, even though the agreements between Proctor and the Union required those contributions. It is further undisputed that there was no consensual modification of the contract that would license Proctor's failure to make the contributions. The Supreme Court, in *NLRB v. Strong Roofing Co.*, 393 U.S. 357 (1969), stated plainly:

> Hence, it has been made clear that in some circumstances the authority of the Board and the law of contract are overlapping, concurrent regimes, neither pre-empting the other. . . . [T]he Board may proscribe conduct which is an unfair labor practice even though it is also a breach of contract remediable as such by arbitration and in the courts. . . . It may also, if necessary to adjudicate an unfair labor practice, interpret and give effect to the terms of a collective-bargaining contract.

Therefore, Respondents' arguments that this matter is one that could only be left to breach of contract actions utterly without merit.[22] Respondents also argue that Proctor was never financially able to make the required payments. Financial distress has never been held to be a defense for unilateral modifications of represented employees' terms and conditions of employment; specifically, the Board has held that, even where the inability to pay is undisputed, failure to pay contributions to such funds as the Union's health and welfare and pension funds is a violation of Section 8(a)(5). *Air Convey Industries*, 292 NLRB 25 (1988).

I find and conclude that Proctor, by failing to make contractually required contributions to the Union's health and welfare and pension funds on behalf of the unit employees for the hours that they worked from December 1 through March 14, has violated Section 8(a)(5), as alleged. Rutgers and B.A. Proctor, because they entered a single-employer relationship with Proctor on March 14, became on that date the joint employer of the unit employees, and their failures and refusals to make the required contributions since March 14 constitute 8(a)(5) violations on their parts.[23] As Rutgers and B.A. Proctor are in a single-employer relationship with Proctor, they will be required to remedy Proctor's unfair labor practices relating to the obligations to the funds based on the unit employee hours worked between December 1 and May 13, as well as their own unfair labor practices relating to the obligations to the funds based on the employee hours worked between March 14 and May 13.

3. Payment of sick and vacation pay

The agreements between Proctor and the Union, as amended by the February 22 agreement, provided 3 days' sick pay. Sick days not taken by March 31 were to be credited to employees as "personal" leave days, or days that employees could take off, with pay, for any reason. The agreements provided vacation pay benefits that varied with length of service and amount of time that had transpired since a vacation was last taken. The agreements further provided that, upon layoff, employees were to be paid all accrued vacation pay on a pro rata basis. Respondents acknowledge that some employees had not taken sick days, as sick days or personal days, at the time the Proctor terminal was closed on May 15. Respondents further acknowledge that some employees had worked long enough to earn some vacation pay as of May 15. Respondents admit that neither the sick day pay, nor the vacation pay, has been paid to the employees. The complaint alleges that Respondent's failure to pay the earned sick day and vacation pay benefits violated Section 8(a)(5).

Respondents do not contend that the Union, in any way, consented to its failures to pay vacation and sick day benefits that were due the employees. A unilateral discontinuance of vacation benefits "or similar established terms and conditions of employment" was held to have violated Section 8(a)(5) in *Emsing's Supermarket*, supra at 304.[24] As well as reasserting their (legally baseless) argument that the payments can only be secured through a breach of contract action in another forum, Respondents defend these allegations on the theory that no such payments are due to the employees if they did not request them before the closing of the terminal. Respondents cite no authority, or contract language, for this position. Lawful labor relations is not a game of catch-me-if-you-can. It could not have been the intent of the parties, as they entered the agreements, that the employees' contractual rights could be unilaterally abrogated by a surprise closing of the Pennsauken facility.

[20] Again, in *Emsing's Supermarket* the Board relied on the elements of interrelation evinced as one of the involved entities went through the closing processes.

[21] Respondent's arguments that, despite the above-cited authorities, liability cannot be premised solely on a single-employer relationship must be addressed to other forums.

[22] There are dissents in Board cases that reason consistently with Respondents, and Respondents contend that those dissents should be followed here. The dissents not law; the decision by the Supreme Court is.

[23] *Continental Radiator Corp.*, 283 NLRB 234 (1987).

[24] See also *NLRB v. Strong Roofing Co.*, supra.

I find and conclude that, by the failures to pay employees accrued sick day pay and vacation pay[25] benefits, Respondents have violated Section 8(a)(5).[26]

4. Transfer of platform work

The complaint alleges that Respondents violated Section 8(a)(5) by transferring certain platform work from the Pennsauken terminal to the Hummels Wharf terminal without the Union's consent. The work involved is the counting, preparation, and loading for ultimate delivery, freight consigned by Excel. Respondents defend against the allegation by asserting that the Union gave its consent to the transfer when it withdrew all grievances at the end of the April 22 meeting.

It is not even clear that ultimate delivery platform work was being done at Hummels Wharf by April 22. Arbeiter testified, "I believe we were already doing it" by the time of the April 22 meeting; his reservation of "I believe" showed that he had some uncertainty, himself. Moreover, when I then asked Arbeiter if the Hummels Wharf operations were discussed at the April 22 meeting; he admitted, "No." That is, either because the Hummels Wharf operation had not started doing ultimate delivery platform work by April 22, or because Arbeiter withheld the information, or both, the Union did not know that ultimate delivery platform work was being done at Hummels Wharf on April 22. If the Union did not have knowledge of something, it could not have consented to it. The Union did not consent to the transfer to Hummels Wharf of the platform work which otherwise would have been done by the unit employees.

I find and conclude that Respondents violated Section 8(a)(5) by unilaterally transferring platform work from its Pennsauken terminal to their terminal in Hummels Wharf, as alleged.[27]

5. Relocation of work

Within a week of the closing of the Pennsauken terminal, Rutgers employees, working out of the East Brunswick terminal, began picking up and delivering freight for Stockham Valve in Pennsauken; this was work that, absent the closing of the Pennsauken terminal, unit employees would have performed. Rutgers employees continued to do that work for Stockham Valve until August when that account was lost by Rutgers, according to the testimony of Arbeiter. Also within a week of the closing of the Pennsauken terminal, Rutgers employees, working out of the East Brunswick and Hummels Wharf terminals, began delivering Excel freight in areas which were south of the map lines agreed to on February 22 and April 22. This also was work that otherwise would have been performed by the unit employees. The Rutgers employees continued performing those delivery functions for Excel until March 1993, when Rutgers lost that account, according to the testimony of Arbeiter. The complaint alleges that Respondents' assigning work to Rutgers employees at East Brunswick and Hummels Wharf constitutes a transfer of work in violation of Section 8(a)(5) because, as Respondents admit, there was no bargaining on these assignments. General Counsel seeks remedies consistent with Board "relocation" cases, specifically, *Dubuque Packing Co.*, 303 NLRB 386 (1991), and *Owens-Brockway Plastic Products*, 311 NLRB 519 (1993).

Respondents contend that there was no relocation of work; Respondents contend that Rutgers secured its contracts with Excel and Stockham Valve through a processes of competitive bidding after the closing of the Proctor terminal, and the work was new work, not transferred work.

It must be remembered that Respondents are a single employer, as I have previously concluded. If Rutgers did secure new contracts with Excel and Stockham, Proctor secured those contracts also. The work involved here was transferred, or relocated, from Respondents' Pennsauken terminal to its terminals in Hummels Wharf and East Brunswick, and this, therefore, is a "relocation" case. The defenses for allegations of unilateral relocations that are outlined in *Dubuque* do not include Respondents' "new contract" defense. Nor should a new contract be a defense to such an allegation; in the trucking industry new contracts are negotiated frequently; in all industries contracts are subject to being replaced by new ones. Employee rights are not subject to defeat simply by an employer's negotiating a new contracts.

I find and conclude that, by unilaterally transferring work which otherwise would have been performed by the unit employees at Pennsauken,[28] to other employees at East Brunswick and Hummels Wharf, Respondents have violated Section 8(a)(5) of the Act.[29]

THE REMEDY

General Counsel seeks the same reinstatement order that was issued in the *Owens-Brockway* work-relocation case, and General Counsel seeks a backpay remedy that continues until that order is complied with.[30] Unlike *Owens-Brockway*, however, it is undisputed that the relocated work no longer exists (Respondents having lost the involved contracts), and reinstatement is presently an impossibility. Respondents shall, however, be required to make the unit employees whole by paying them as backpay,[31] with interest,[32] what they have would have earned in performance of the relocated pickup

[25] There is simply no contractual language, or law, or logic, to support Respondents' contention that the employees' vacation pay rights did not vest because they were laid off in a cessation of operations.

[26] Precisely which employees should have received sick day or vacation payments, and how much those payments should have been, are matters properly left to the compliance stage of this proceeding.

[27] Precisely which portion of the work would have otherwise been done by the unit employees, and which employees are to be made whole, are matters properly left to the compliance stage of this proceeding.

[28] On brief, General Counsel argues that all post-May 15 assignments of Excel work to Rutgers employees were violative; this contention ignores the agreements of February 22 and April 22 in which the Union agreed that Rutgers employees would perform such work north of the map lines.

[29] Precisely what work would otherwise have been done by the unit employees, and which employees should receive remedy, are matters properly left to the compliance stage of this proceeding.

[30] The General Counsel does not seek an order requiring restoration of the Pennsauken operations.

[31] Backpay shall be computed on a quarterly basis, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950).

[32] Interest shall be computed in accord with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

and delivery work, and the transferred platform work, involved herein.[33]

Respondents shall also be ordered to transmit to the Union's health and welfare and pension funds all contributions for the employee hours worked from December 1 through May 13, with any interest or other terms applicable to the payments to be computed in accordance with *Merryweather Optical Co.*, 240 NLRB 1214 (1979). Respondents shall also be ordered to make unit employees whole for any losses they may have suffered as a result of its failure to make these contributions. *Kraft Plumbing & Heating*, 252 NLRB 891 (1980), enfd. mem 661 F.2d 940 (9th Cir. 1981), to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest. Also, Respondents shall pay all unpaid 1992 vacation and sick leave pay to all unit employees entitled to it, with interest. *Emsing's*, supra at 305.

As single employers, Rutgers, Proctor, and B.A. Proctor are jointly and severally liable for the monetary obligations set forth above. However, only Proctor Express will be required to bargain with the Union in the event that it, or its successors or assigns, reopens the Pennsauken terminal. In the event that the Pennsauken operations are reopened by Proctor, its successors or assigns, the unit employees affected by the conduct herein shall be placed on a preferential hiring list. Respondents further shall be required to mail appropriate notices to the employees employed by Proctor when the Pennsauken terminal was closed on May 15.

[Recommended Order omitted from publication.]

[33] Precisely when Rutgers lost the Stockham Valve and Excel accounts are matters properly left to the compliance stage of this proceeding. (Arbeiter's testimonial estimates of August 1992 and March 1993, respectively, are not determinative.)